

To: Candidates for President of the United States
From: Protect Democracy
Date: June 2019
Re: **Filibuster Reform — Background, Policy Options, and Democracy Considerations**

Several campaigns have asked for our views on eliminating the Senate filibuster. This memo provides some brief background information on options for filibuster reform as well as considerations that candidates should take into account in formulating their positions.

Support for eliminating the filibuster has drawn strange bed-fellows. In just the last year, President Trump has called for eliminating the filibuster to advance his healthcare and immigration policies, while some progressive candidates have also advocated eliminating the filibuster as a means to enact an ambitious domestic policy agenda. Other Democratic candidates have warned that changing the filibuster would make it more difficult to defend existing policies they support.

As set forth below, we encourage candidates to develop their views on filibuster reform in light of broader structural democracy considerations — and not for instrumental or partisan purposes.

Short Background on the Senate Filibuster

Using a filibuster to delay or block legislative action has a long history — but the filibuster was not provided for in the Constitution and does not appear to have been contemplated by the Framers. According to one large [group of scholars](#), “There is no historical evidence that the framers anticipated that the Senate would adopt rules allowing for a filibuster. In fact, the first House and the first Senate had nearly identical rule books, both of which included a motion to move the previous question,” i.e. to call for a majority vote.

In the early years of Congress, House members and Senators could filibuster action on legislation by holding the floor for debate. As the House grew in numbers, it revised its rules to limit debate. In the Senate, however, unlimited debate continued.

In 1917, senators adopted a rule ([Rule 22](#)) that allowed the Senate to end a debate with a two-thirds majority vote, a device known as “cloture.” Even with the new cloture rule, filibusters remained an effective — albeit rarely used — means to block legislation, since a two-thirds vote is difficult to obtain. Filibusters were particularly useful to Southern senators who used them to block civil rights legislation, including anti-lynching legislation. Enactment of the Civil Rights Act of 1964 followed a 60 day filibuster and cloture vote. .

In 1975, the Senate reduced the number of votes required for cloture from two-thirds to three-fifths of the body, or 60 Senators.

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Throughout most of U.S. history, filibusters were fairly rare. Beginning in the last two decades however (at the end of President Bush's term and especially during President Obama's term) filibuster use has exploded.

The filibuster has been defended on counter-majoritarian grounds: there should be limits to the power of a majority to force policies on a minority. This is an important principle of liberal democracy. However, examples like the Civil Rights filibusters show that, in extreme circumstances, this counter-majoritarian tool can be used to oppress and enforce a strong status-quo bias. A central theme in the history debate over the filibuster is under what circumstances a counter-majoritarian bias should be overruled.

Exceptions to the Filibuster

There are currently three significant exceptions to the Senate filibuster rule.

First, it no longer applies to judicial and executive branch nominees. This change was spearheaded by Senator Reid in 2013 (for lower court nominees and executive branch officials) and Senator McConnell in 2017 (for Supreme Court nominees).

Second, the filibuster cannot be used to block bills enacted through the special reconciliation process that was created by the Congressional Budget Act of 1974. Under that reconciliation process, debate time is limited — but this process can only be used for certain measures that are deficit-reducing and related to the budget.

Third, special statutory procedures explicitly bypass the filibuster, usually to provide accelerated Congressional review over executive branch actions. Examples include, but are not limited to, the War Powers Act, the National Emergency Act, the Congressional Review Act, and so-called Fast Track Authority to review trade agreements. These allow Senate minorities of the body to force resolutions onto the Senate's calendar and, in that way, allow Senate minorities to force accountability on the Senate majority and the executive branch.

Available Options for Filibuster Reform

Much of the public debate about the legislative filibuster is reductive. It assumes that the Senate can either maintain the existing legislative filibuster or abolish it entirely. But there are in fact a [range of intermediate reform options](#) that could remedy some of the problems of the filibuster without eliminating it altogether. The Senate controls its own rules — and there is no judicial review — so only the Senate can reform or eliminate the filibuster. (For these reasons, the filibuster currently operates as more of a norm than a hard rule: any 51 Senators could change the 60-vote requirement whenever they wish).

These options would not lead to full majority rule in the Senate in the way that full abolition would. But they could transform the filibuster into a less counter-majoritarian and higher-cost procedure, which might discourage its abuse or over-use.

Eliminate the filibuster entirely so the Senate operates on pure majority rules

Any 51 Senators (or 50 Senators and a Vice President) may change the operation of the Senate to eliminate the filibuster entirely. A majority vote would then be sufficient to end debate and move to a vote on any measure. Recent changes to the application of Senate rules around filibustering nominations demonstrate the process for how this is accomplished.

Expand the exceptions to the filibuster

Congress could adopt special procedures to consider certain kinds of legislative activity under an expedited process. For example, revisions to the Voting Rights Act formulae could have special status to protect the rights of all citizens. These could be modeled on provisions in the National Emergency Act or the Congressional Review Act.

Lower the number of votes needed to end a filibuster

One option would be to make the threshold for a successful cloture vote on a legislative filibuster equal to the total number of sitting majority-party Senators, including independents caucusing with them.

This would mean the threshold would rise and fall according to the size of the majority. It would make cloture easier to achieve since the majority would not need to rely on any minority party votes to succeed. As compared to abolishing the filibuster, this would still have a moderating effect on legislation, since the majority would still need to rely on the votes of those Senators closest to the ideological center.

Another option would be to change the threshold for a successful cloture vote from 60 to 55 votes. 55 is the statistical mode for the size of the majority since the 86th Congress (the first time the Senate had 100 seats). Since it is not uncommon for the majority party to have this many seats, if the majority is larger than that by even a handful of seats, it will become easier to obtain cloture. If the majority is smaller than 55 Senators, the majority will still be forced to obtain the buy-in of the minority party to conduct controversial business.

A third approach would be to lower the threshold each time a cloture vote fails. In 2013, former Senator Tom Harkin of Iowa introduced [a resolution](#) to achieve this. So while the filibuster would still be means of slowing things down, it would not be able to prevent the majority from acting.

Require Senators to filibuster in person

In current practice, Senators do not need to filibuster in person because they can use a mechanism known as the “hold”: they can notify leadership that they will object to a unanimous consent request, and the party leader will honor this request by preventing consideration of an item of business until there are 60 votes. Party leaders enforce holds partly as a courtesy to their colleagues and partly so that a live (“talking”) filibuster does not bog down the Senate. Holds are a customary practice and not an actual Senate rule, so party leaders could simply refuse to enforce them.

One option to eliminate this type of stalling would be to require filibustering Senators to actually take the floor and speak — which would create some practical and political incentives to not filibuster as a matter of course. While eliminating holds would deny Senators one route for obtaining more time to examine an issue, request information, or force a change in a bill, Senators would still be able to achieve these objectives through lengthy Floor debate and a robust amendment process.

Limit the Delays Caused by the Filibuster

The Senate also has options to maintain the 60-vote requirement for ultimate enactment of a bill while reducing the delay created by the filibuster and imposing costs for using the filibuster.

One approach would be to [eliminate the filibuster on the motion to proceed](#) to promote more debate. While a motion to proceed requires a simple majority to be adopted, the motion to proceed is debatable, so Senators can filibuster, meaning the majority often must muster 60 votes to even begin debating the bill or piece of business itself.

Eliminating the 60-vote requirement for the motion to proceed could be done a number of ways, including by changing Senate rules for the voting threshold to begin debate on any bill with a simple majority, as Republican Senator James Lankford of Oklahoma [wrote](#) in February 2016.

A related approach would limit the amount of time available for debate on the motion, as Senators Tom Udall, Merkley, and Harkin attempted to do in 2013 by introducing [a resolution](#) to change the Senate rules, which included a provision to limit debate on the motion to proceed to two hours, equally shared by the majority and minority parties.

Another way to reduce the delay caused by the filibuster would be to reform the cloture petition timeline and post-cloture debate time. Rule 22 not only establishes the supermajorities to invoke cloture, it also currently provides a timeline governing when the Senate should vote on cloture (2 days following the presentation of a cloture petition) and it also provides for up to 30 “hours of consideration” after cloture is invoked. The original wording of the cloture rule permitted each Senator an hour of debate time after cloture, but this allotment has been reduced over the years.

While further reducing post-cloture debate time would leave the filibuster in place, the tighter time limits might make it more tolerable to the majority party. In 2013, the Senate temporarily instituted [Republican Senator James Lankford’s proposal](#) to reduce post-cloture debate time from 30 hours to 8, but it was only in effect for the 113th Congress.

Democracy Considerations Around Filibuster Reform

Political leaders often view filibuster reform through the lens of whether it would make it easier to enact the policies they support — or harder to block policies they oppose? Thus, several candidates who are sitting Democratic Senators have cautioned against filibuster reform, noting that the filibuster gives them (as part of the current Senate minority) a tool to block President Trump’s agenda.

We recommend against adopting a position on filibuster reform for partisan or instrumental purposes

While this more instrumental approach is understandable, we caution against formulating views on the filibuster solely through this instrumental perspective for three reasons.

First, this approach is unlikely to be effective even on its own terms. Elections are unpredictable and it is difficult to anticipate who will be President and who will hold the Senate — and by what margins. For example, even if your party wins the presidency in 2020 and your party controls the Senate, some Senators from your party might be unwilling to support changing the filibuster rules. And then, of course, at some point the other party is likely to take the majority and so could easily repeal any new legislation. So supporting a particular filibuster approach purely for the means of achieving specific policy goals is likely to be short-sighted.

Second, an approach to institutional rules that is developed or framed as purely instrumental can undermine confidence in those institutions. [Public approval of Congress](#) is already at or under 20%; gaming the rules to achieve purely partisan or instrumental ends could further weaken support for the institution. The weakening of support for key institutions of our democracy — like the Congress — can in turn [drive loss of faith in democracy](#), leading voters in the long run to turn more and more to anti-democratic politicians, like President Trump.

Third, as Professors Daniel Ziblatt and Steve Levitsky explain in their book *How Democracies Die*, the concept of “mutual restraint” is critical to a healthy democracy. That concept suggests that participants in a democracy must hold back from using every possible weapon at their disposal to achieve desired political or policy outcomes or else risk setting off an arms race of one-upmanship that ends with the ultimate destruction of the kinds of democratic institutions necessary for a democracy to function. While eliminating the filibuster to advance small-d democratic values could be seen as dishonoring this admonition, we do not understand this admonition to prohibit any and all forms of structural readjustment. But eliminating the filibuster solely to advance short-term policy goals is surely the kind of one-way ratchet Ziblatt and Levitsky warn of.

We recommend that candidates develop and articulate their views on the filibuster to advance their democracy agendas

We recommend that candidates develop and articulate their views about the filibuster in the context of their positions on broader democracy issues. In so doing, candidates may wish to consider the following factors.

- **The filibuster generally exacerbates anti-majoritarian rules in an institution that is already counter-majoritarian in its composition.** The majority in the Senate is already skewed by the fact that small states and large states have the same number of votes. This means that a single voter from Wyoming now has 40 times more representation in the Senate than a voter from California. Layering the filibuster on top of this skewed representation allows Senators representing a very small minority of American voters to block measures supported by the vast majority of the country. (It can, however, in some situations allow a minority of Senators representing a majority of the

public to block measures supported by a majority of Senators representing a minority of the public.)

- **By blocking Congress from enacting legislation, the filibuster may encourage Presidents to use executive power more aggressively.** In recent years, we have seen Presidents of both parties turn to more extensive use of executive power as their agendas have been stalled in Congress. The filibuster, by making it more difficult for Congress to pass bills, may contribute to this trend. For example, after the DREAM Act was filibustered in 2010, President Obama’s Administration launched the DACA program. In contrast, by lowering the threshold on nominations to 51, the Senate shifted power to the executive by limiting the amount of negotiation necessary to appoint senior officials.
- **The filibuster may be used to block pro-democracy reforms.** Longstanding inequities in the structures of our democracy as well as recent anti-democratic [measures enacted in several states](#) and embraced in recent [Supreme Court decisions](#) leave substantial gaps in the laws surrounding our democracy. Congress has a critical role in enacting reforms — such as those set out in [Protect Democracy’s Roadmap for Renewal](#) —to strengthen and rebuild our democracy. While these measures have [bipartisan support](#), the filibuster could be used to allow a minority to perpetuate un-democratic practices and structures.
- **Preserving the filibuster may promote more bipartisan compromise, temper extremism, and reduce policy whiplash.** Cutting the other way, some attribute weaknesses in our democracy to the rise of partisanship and to both parties’ embrace of more extreme policy views. Those concerned about the growing distance between the parties and worried about more extreme policies from the Right or Left caution that eliminating the filibuster would reduce an incentive for compromise on legislation. Eliminating the filibuster might also lead to increased and unsettling policy whiplash, where the parties take turns enacting and then undoing each other’s agendas, undermining the kind of stability and predictability that can be important to systemic sustainability.

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There are sure to be other arguments for and against the filibuster. We have not yet determined the precise course we think is best for democracy, thus this memo is not intended to urge candidates to take a particular position on the filibuster. It instead aims to provide you with materials to help you form a view based on your views about the biggest risks to our democracy and opportunities for reform and renewal. We urge candidates who take a position on this issue to develop and articulate their views about the filibuster based on these sets of considerations.

Please feel free to contact Protect Democracy’s team for further information on this and related issues.